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Supreme Court, U.S.
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No. 97-1686

In The

Supreme Court of the United States

October Term, 1997

SUZANNE CAHNMANN,

Petitioner,

v.

SPRINT CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether breach of contract and other claims pleaded under state law against a telecommunications common carrier, and created or governed by federal tariffing law and filed tariffs, are subject to federal question jurisdiction and thus removable to federal district court.

2. Whether breach of contract and common law tort claims pleaded under state law against a telecommunications common carrier may be dismissed when, pursuant to the filed tariff doctrine, they are inconsistent with federal tariffing law and filed tariffs.

LIST OF PARTIES

Petitioner is Suzanne Cahnmann, the plaintiff and appellant below. Respondent is Sprint Corporation, the defendant and appellee below. These parties were the only parties to the proceedings below.

Pursuant to Supreme Court Rule 29.6, Sprint Corporation states that it has no parent. Sprint Corporation has the following nonwholly owned subsidiaries, none of which are publicly traded:

Global One Communications Europe, L.L.C.
Global One Communications GBN Holding, Ltd.
Global One Communications Holding, B.V.
Global One Communications, L.L.C.
Global One Communications, Ltd.
Global One Communications Operations, Ltd.
Global One Communications Service, B.V.
Global One Communications World Holding, B.V.

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BRIEF IN OPPOSITION

Respondent Sprint Corporation respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 133 F.3d 484 (7th Cir. 1998) and is included in the Appendix to the Petition at pp. A1-A11. The memorandum opinion and order of the district court is reported at 961 F. Supp. 1229 (N.D. Ill. 1997) and is included in the Appendix to the Petition at pp. B1-B9.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1998, and the Petition was filed on April 7, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction in the court of appeals was based upon 28 U.S.C. § 1291, and in the district court upon 28 U.S.C. § 1331.

STATUTES INVOLVED

28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

47 U.S.C. § 203(a) provides, in pertinent part:

> Every common carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication . . . , and showing the classifications, practices, and regulations affecting such charges.

47 U.S.C. § 203(c) provides, in pertinent part:

> No carrier . . . shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication . . . than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

STATEMENT OF THE CASE

This is a putative consumer class action for breach of contract and fraud, brought in state court by a purchaser of long distance telephone services offered by Respondent Sprint Corporation ("Sprint"). Sprint removed the case to federal district court and moved for judgment on the pleadings. The Petitioner moved to remand. The district court denied Petitioner's motion to remand, finding federal question jurisdiction, and granted Sprint's motion for judgment on the pleadings, based on the filed tariff doctrine. The court of appeals affirmed.

A. Factual Background

Petitioner Suzanne Cahnmann ("Cahnmann") was a subscriber to Sprint's "Fridays Free" program for small business customers. Under this program, customers committed to a monthly minimum charge and received up to $1,000 per month of free calling on Fridays. Pursuant to the common carrier provisions of the Federal Communications Act of 1934, 47 U.S.C. §§ 201-276 ("FCA"), Sprint filed its tariff governing the terms and conditions of the Fridays Free program with the Federal Communications Commission ("FCC"). The tariff for the program initially included domestic and international calling, but was amended pursuant to FCC regulations in April 1996 to exclude international calling to nine countries. The tariff amendment was necessitated by an unanticipated increase in international calling volume that affected Sprint's ability to provide international calling services and threatened its ability to provide quality domestic service.

Cahnmann filed her complaint in state court alleging that Sprint's actions constituted a breach of its contractual obligations. Cahnmann also alleged that Sprint's actions constituted unfair and deceptive trade practices in violation of the Consumer Fraud and Deceptive Business Practices Act of Illinois, 815 Ill. Comp. Stat. 505/1, and the Uniform Deceptive Trade Practices Act, 815 Ill. Comp. Stat. 510/1, and that Sprint's acts constituted common law fraud. Cahnmann additionally sought relief under the Illinois Declaratory Judgment Act, 735 Ill. Comp. Stat. 5/2-701.

Absent from Cahnmann's complaint was any mention of the publicly-filed federal tariffs pursuant to which Sprint offered its Fridays Free program. The program was introduced with a tariff that became effective on January 1, 1996. Section 10.21 of the tariff provided that new and existing Sprint Business Sense® customers with a certain minimum monthly commitment level would be eligible for free usage on one day a week up to $1,000 per customer. Following a series of minor amendments, the tariff was amended on April 18, 1996, to exclude certain countries from the free usage on Fridays. It is that tariff amendment that Cahnmann challenged by filing the complaint.[1]

Sprint removed the action to federal court pursuant to 28 U.S.C. § 1441(a) and (b), based on federal question and diversity jurisdiction. As to federal question jurisdiction, Sprint stated, among other things, that jurisdiction was proper under the artful pleading doctrine because Cahnmann's claims could not stand without substantial interpretation of federal law issues. Sprint denied Cahnmann's allegations, and subsequently moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). Cahnmann then moved to remand for lack of subject matter jurisdiction.

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[1] In place of free calls on Fridays to the nine countries, Sprint amended its tariff to offer a twenty-five percent discount on calls to the enumerated countries every day of the week. All tariffs regarding the Fridays Free program were prepared, filed, and became effective pursuant to the applicable rules and regulations of the FCC promulgated pursuant to its authority under the FCA. *See* 47 U.S.C. §§ 201, 203, 204, 205; 47 C.F.R. §§ 61.1-.193 (1994).

B. The District Court and Court of Appeals Decisions

The district court's April 21, 1997 decision denied Cahnmann's remand motion and granted Sprint's motion for judgment on the pleadings. Pet. App. at B1, B9. The district court first held that Cahnmann's complaint was artfully pleaded and thus subject to federal jurisdiction:

> Is this claim artfully pleaded? I think so. By speaking generally of contract and misrepresentations to state its claims of contract breach and of fraud and deception, the complaint artfully avoids the obvious. Sprint must charge its customers in conformity with the tariffs it filed with the Federal Communications Commission. 47 U.S.C. § 203(a) (1994). . . . The complaint is written to avoid any mention of the rate setting and rate changing mechanism for long distance phone calls because, of course, Congress has given the FCC sole authority in this area (absent surrender of that authority which has not occurred). This is a complaint about the right of Sprint to bill in a certain way, and it is a federal claim.

Pet. App. at B3. The court then found that Cahnmann's claims were barred under the Federal Communications Act, the filed tariff doctrine, and related law:

> The core of the Federal Communications Act is a requirement that telecommunications providers tell the FCC what they will charge for each of their services. They file a tariff with their rates. The FCC has the power to decide whether the filed rates are reasonable. The providers have to stick to those rates, charging neither more nor

> less. Even if they explicitly agree with a customer to alter the rate, the agreement has no legal effect. The tariff, the filed rates, are publicly available and the law presumes a provider cannot effectively misrepresent its rates. Whatever the salesman says and whatever is advertised, the consumer can learn the truth from the FCC. . . . There is, therefore, no contract to enforce, and Cahnmann's reliance upon the representations of Sprint is not a permissible basis for a damage claim. And were it permissible, there is no way that damages can be awarded. If a court were to order Sprint to compensate Cahnmann for the costs of her overseas calls on Fridays, it would be modifying the tariff and only the FCC has that power.

Pet. App. at B5-B6.

Based upon these findings, the district court held that Cahnmann's contract claim must fail "because it is the tariff and not the contract that controls the terms of business between Cahnmann and Sprint" and her fraud claims fail "because damages are not possible without a judicial amendment of the tariff which is forbidden." *Id.* at B7. The court also dismissed the state statutory and injunctive claims, on the further grounds of a state statutory exemption and inadequate pleading. *Id.* at B8-B9.

The court of appeals affirmed in a unanimous decision, per Chief Judge Posner, finding federal question jurisdiction:

> A tariff filed with a federal agency is the equivalent of a federal regulation, and so a suit to enforce it, and even more clearly a suit to invalidate it as unreasonable under federal law (both

> types of suit being comprehended in the plaintiff's contract count), arise under federal law. And since the federal regulation defines the entire contractual relation between the parties, there is no contractual undertaking left over that state law might enforce.

Pet. App. at A6 (citations omitted). The court concluded further that "[t]his is an uncontroversial application of the 'artful pleading' doctrine," because if a claim can arise only under federal law, "the case is removable to federal court even if the plaintiff sedulously avoids mention of federal law in his complaint." *Id.* at A8. Moving to plaintiff's fraud claims, the court found that "the relief sought by the fraud counts is identical to that sought by the contract count," and thus inconsistent with the filed tariff. *Id.* at A9. Observing that Cahnmann was unwilling to seek an FCC determination of the reasonableness of Sprint's actions, the court affirmed the entry of judgment for Sprint. *Id.* at A10.

REASONS FOR DENYING THE WRIT

1. The Petition does not present any issue as to which there is a conflict of decisions or which constitutes an important or substantial question of federal law. The circuit court decisions are in strong agreement over the core issues presented by the Petition, and this Court's decisions support the approach taken in the circuits. The district court in this case dismissed several of the claims at issue on alternative state law and procedural grounds, thus these matters are not well-suited for review on a

writ of certiorari. The Petition also seeks review of matters that are within the primary jurisdiction of a federal agency, although the Petitioner elected to forego an agency referral in the lower courts. For these reasons, the court of appeals' decision does not merit further review.[2]

2.a. The Petition's contention that the circuits "utterly clash" over federal question jurisdiction in cases like this one is wrong. There is uniformity among the circuits that state law breach of contract claims such as those asserted here are governed by federal law and thus cases asserting them are removable.

b. Six circuits, including the Seventh Circuit here, have upheld federal question jurisdiction over breach of contract disputes concerning telecommunications services that are subject to federal filed tariff requirements. In *Marcus v. AT&T Corp.*, 138 F.3d 46, 55-56 (2d Cir. 1998),

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[2] Several recent developments diminish the significance and likely recurrence of the issues in this case. After the original filing of this case, the FCC issued its *Second Report and Order in the Matter of Policy and Rules Concerning the Interstate. Interexchange Market Place Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61 (FCC 96-424) (Oct. 31, 1996), which mandates the gradual elimination of the tariff filing regime for nondominant interexchange (i.e., long distance) carriers like Sprint in the market for interstate, domestic, interexchange services. This order is currently the subject of a stay entered by the District of Columbia Court of Appeals. Furthermore, this Court has granted a writ and heard arguments in a case presenting issues concerning the viability and application of the filed tariff doctrine. *AT&T Corp. v. Central Office Tel., Inc.*, No. 97-679 (argued March 23, 1998).

the court found that a state common law breach of warranty claim against a carrier necessarily arose from the carrier's federal filed tariff, which constitutes the contract with its customers, and thus was subject to federal jurisdiction. In *MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1096 (3d Cir. 1995), *cert. denied*, 117 S. Ct. 64 (1996), the court found that a dispute over long distance services was "based upon, and draws its life from, the tariff that MCI filed with the Federal Communications Commission," thus the district court had subject matter jurisdiction. Likewise, in *Western Union International, Inc. v. Data Development, Inc.*, 41 F.3d 1494, 1497 (11th Cir. 1995), the court found that the cause of action "arises under the Communications Act." In *MCI Telecommunications Corp. v. Graham*, 7 F.3d 477, 479 (6th Cir. 1993), the court found jurisdiction because "[t]ariffs filed with the F.C.C. conclusively and exclusively control the rights and liabilities between a carrier and its customer" and "MCI provided service to Graham according to the terms of these federal regulations." Finally, in *MCI Telecommunications Corp. v. Garden State Investment Corp.*, 981 F.2d 385, 387 (8th Cir. 1992), the court found that the claim was "necessarily based on the filed tariff."[3]

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[3] It matters not, as Petitioner posits, that some of these cases were brought by the carrier rather than the customer, because the claims of either must arise under the same federal law. As the court of appeals observed, "the customer's claim for damages resulting from [the carrier's] refusal [to honor the terms of a tariff (in this case, the first 'Fridays Free' tariff)] is necessarily based on the filed tariff." Pet. App. at A7; *see Louisville & Nashville R.R. v. Rice*, 247 U.S. 201, 202 (1918) (duties and obligations of both carrier and consignee arise from tariff).

c. Each of these circuit decisions relied on authority from this Court construing the Interstate Commerce Act. Because the FCA had its genesis in the Interstate Commerce Act and the two statutory schemes have similar provisions and objectives, this Court's decisions under the Interstate Commerce Act are highly persuasive in this context. *E.g., Western Union*, 41 F.3d at 1496; *Garden State*, 981 F.2d at 386-87; *see also MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994) (stating that the Interstate Commerce Act served as model for the FCA).

In *Louisville & Nashville Railroad v. Rice*, 247 U.S. 201, 202 (1918), this Court held that a railroad carrier's duty to collect and a consignee's obligation to pay freight charges prescribed by a tariff filed under the Interstate Commerce Act "grow out of and depend upon that act." The Court thus found that federal jurisdiction was present. *Id.* at 202-03. In *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam), the Court reaffirmed its holding in *Rice*. The Court rejected the court of appeals' decision that an action for payment for transportation services was a "simple contract-collection action," and held that the claim was necessarily based on the filed tariff. *Id.* at 533, 535. The Court observed that "'the parties are held to the responsibilities imposed by federal law, to the exclusion of all other rules of obligation.'" *Id.* at 535 (quoting *Rice*, 247 U.S. at 203). The same is true here. Sprint is subject to a comprehensive federal tariffing law that governs its relationships with long distance customers. Cahnmann's claim necessarily implicates this

body of federal law and thus is properly within federal court jurisdiction.[4]

d. Only one circuit arguably has deviated from this view, although there are conflicting decisions within that circuit itself. In *American Telephone & Telegraph Co. v. Florida-Texas Freight, Inc.*, 357 F. Supp. 977 (S.D. Fla.), *aff'd*, 485 F.2d 1390 (5th Cir. 1973) (per curiam), the Fifth Circuit affirmed a ruling that the federal district court had jurisdiction over AT&T's suit to collect charges based on a filed tariff rate. Notwithstanding this decision, in *MCI Telecommunications Corp. v. Credit Builders of America, Inc.*, 980 F.2d 1021 (5th Cir. 1993), with little discussion, the Fifth Circuit concluded that MCI's suit to recover for unpaid charges for telecommunications services was simply a suit in contract or quantum meruit. Based on this characterization, the court concluded that federal subject matter jurisdiction was lacking. *Id.* at 1023. A district

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[4] These cases usurp the Petition's contentions that this is a matter implicating "complete preemption," or one in which removal was premised improperly on a federal defense. As the district court noted, jurisdiction "is not dependent on the existence of complete preemption." Pet. App. at B2. Instead, "[w]hat is required is that the state court pleading actually involves federal law and not state law." *Id.* *Thurston* and *Rice* make clear that claims necessarily based on a federal filed tariff are subject to federal jurisdiction. *See also Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981) (referring to "settled principle" that a case is properly removable when the real nature of a claim is federal); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 809-10 n.3 (1988) ("a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint"). Likewise, this cannot be an instance of removal based upon a federal defense, because the claim itself arises under federal law, as demonstrated by *Thurston* and *Rice*.

court within the Fifth Circuit has held that the prior *Florida-Texas Freight* decision is the controlling authority in the Fifth Circuit, *see MCI Telecommunications Corp. v. United Showcase, Inc.*, 847 F. Supp. 510, 513 (N.D. Tex. 1994), and the *Credit Builders* decision has been the subject of criticism by several other circuit decisions, including the decision in this case. *See* Pet. App. at A6 (stating that *Credit Builders* "is impossible to reconcile with Supreme Court authority – the court failed even to cite *Thurston* or *Rice*"); *see also American Tel. & Tel. Co. v. City of New York*, 83 F.3d 549, 552 (2d Cir. 1996) (criticizing *Credit Builders*); *Western Union Int'l, Inc.*, 41 F.3d at 1496 n.3 (same). This confusion within the Fifth Circuit does not present the kind of conflict with the other six circuits that merits review on a petition for a writ of certiorari.

3. Although much of the argument in the Petition focuses on jurisdiction over tort and state statutory claims, this case does not squarely present the question of whether there is federal question jurisdiction over such claims. The complaint here included the obviously removable breach of contract claim, and the other claims at a minimum were subject to supplemental jurisdiction pursuant to 28 U.S.C. § 1367. The circuit court also found that those claims were subject to federal jurisdiction because "the relief sought by the fraud counts is identical to that sought by the contract count." Pet. App. at A9. As the court observed, "in this case 'fraud' is just another name for 'breach of contract,' so that to allow the plaintiff and her class to proceed in state court under state fraud law would allow the original tariff to be enforced, and the amended tariff set aside, in a suit under state law, which . . . is not allowed." *Id.* The court thus found that

all of the claims here were effectively seeking "breach of contract relief" inconsistent with the tariff. In *Marcus*, 138 F.3d at 46, which Petitioner claims "disagrees" with *Cahnmann* on this point, the court nevertheless upheld supplemental jurisdiction over pendent state law claims because they "implicate[d]" the doctrine of preemption. *Id.* at 57. Thus, both courts actually reached the same result, rendering the supposed conflict illusory. Finally, inasmuch as the exercise of supplemental jurisdiction is a matter committed to district court discretion, it is not well-suited for review here.

4.a. The Petition does not challenge the dismissal of Cahnmann's breach of contract claims pursuant to the filed tariff doctrine, but focuses again on the common law fraud and state statutory claims. As the court found, however, "the relief sought by the fraud counts is identical to that sought by the contract count," Pet. App. at A9, thus Sprint's federal filed tariff would be a dead letter if customers could escape it by mislabeling or artfully pleading their claims. *See also Marcus*, 138 F.3d at 59-65 (dismissing fraud claims and relying on filed tariff doctrine).[5] These essentially are factual matters that are

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[5] The Petition's reliance on the FCA's "savings clause," 47 U.S.C. § 414, to preserve Cahnmann's claims is misplaced. No circuit has adopted the broad reading of the clause advocated in the Petition. As the court noted below, such an approach would "gut the federal regulatory scheme." Pet. App. at A5. The savings clause preserves only state claims that address obligations different from those created by the FCA, and cannot plausibly be read to preserve state law claims that are in direct conflict with the strict filing and charging duties mandated by the FCA, as with Cahnmann's claims here. *See also Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701, 707-08 n.6 (1st Cir. 1977).

directly tied to the manner in which the causes of action are pleaded and the specific allegations and relief sought in the complaint, and they do not merit the Court's review.[6]

b. The second question presented in the Petition also is not appropriate for this Court's review because the district court dismissed the state statutory fraud and deceptive practice claims, including the request for equitable relief, on alternative grounds. Specifically, the court found the claims "untenable" pursuant to state statutory exemptions for matters governed by federal regulation. Pet. App. at B8. Likewise, the injunctive claim was found to be inadequately pleaded. *Id.* at B9. These rulings were

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("we read § 414 as preserving causes of action for breaches of duties distinguishable from those created under the Act"); *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 442, 98 Ill. Dec. 24, 30, 493 N.E.2d 1045, 1051 ("[i]t is implausible to think that section 414 of the Act preserved all [s]tate-law remedies affecting interstate telephone carriers no matter how repugnant those [s]tate laws are to the purposes and objectives of Congress"), *cert. denied*, 479 U.S. 949 (1986).

[6] The factual distinctions also explain the differing results in the lower court cases cited in the Petition. Where the claims and relief sought did not draw upon or require interference with the federal filed tariff, those cases were permitted to go forward. Significantly, however, even customers whose claims are subject to the filed tariff doctrine are not without protection, for they may challenge the reasonableness of the carrier's action before the FCC. *See* 47 U.S.C. § 208. The FCC has the authority to grant relief to those victimized by unreasonable rates and practices. 47 U.S.C. § 205.

not challenged on appeal, and they do not merit consideration on certiorari in any event.[7]

5.a. The third question presented in the Petition asks the Court to shape the law concerning amendment of FCC tariffs. This is a matter committed in the first instance to the FCC under the doctrine of primary jurisdiction, *see, e.g., United States v. Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956), if not directly by statute. *See* 47 U.S.C. §§ 151, 201-03. As the circuit court noted, Cahnmann explicitly refused to take this matter to the FCC. Pet. App. at A10.

b. Even if the issue of the effect of tariff amendments was properly presented to this Court, the Court's decisions, as well as those of the FCC and lower courts, all support the principle that customers are bound by tariff amendments. The Court has held that "[i]f the shipper sees fit to make a contract covering a definite period for a rate in force at the time he must be taken to have done so subject to the possible change of the published rate in the manner fixed by statute, to which he must conform or suffer the penalty fixed by law." *Armour*

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[7] Petitioner's recent visit to Sprint's site on the world wide web – apparently cited to raise the implication that the alleged fraud is continuing – is beside the point here. Pet. at 18 n.21. The terms of the current Fridays Free offering are much different from that offered to Cahnmann. Among other things, all international service currently is excluded from the program. Furthermore, all of the changes to the program – as with the one change at issue here – are contained in Sprint's filed tariffs and thus available to Cahnmann and other members of the public. *See* Pet. App. at A9 ("there is no suggestion that Sprint is concealing the terms of the amended tariff").

Packing Co. v. United States, 209 U.S. 56, 82 (1908); *see also* Pet. App. at B5 ("The customer is presumed to be aware that amendments to tariffs are always possible."); *American Broadcasting Cos., Inc. v. FCC*, 643 F.2d 818, 825-26 (D.C. Cir. 1980) (holding that in determining whether a carrier's tariff provision was unlawful on its face, FCC properly refused to give any weight to the fact that the revised tariff conflicted with a contract between the carrier and two customers). The FCA itself contemplates that a carrier will amend its tariff, *see* 47 U.S.C. § 203(b), and the FCC has noted:

> As a matter of law, under the filed rate doctrine, such contractual arrangements between carriers and users could always have been superseded by a subsequent tariff filing. . . . Thus, telecommunications users have historically faced and continue today to face the potential risk that a carrier could choose to file a tariff that alters a pre-existing long-term service contract. We will, of course, carefully examine, in post-effective tariff review, any petitions from users challenging the reasonableness of any substantial alterations, and could find them unlawful.

Tariff Filing Requirements for Nondominant Common Carriers, 8 F.C.C.R. 6752, ¶ 26 (1993) (1993 WL 757320), *vacated on other grounds, Southwestern Bell Corp. v. Federal Communications Comm'n*, 43 F.3d 1515, 1526 (D.C. Cir. 1995). Accordingly, this is not an important or substantial question that justifies an exercise of this Court's discretionary review.

CONCLUSION

The petition for a writ of certiorari should be denied.[8]

Respectfully submitted,

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[8] Respondent requests that it be permitted to file a supplemental brief after the Court's ruling in *AT&T Corp. v. Central Office Telephone, Inc.*, No. 97-679, concerning the effect of the Court's ruling on the issues raised by the Petition.